Supreme Court, U.S.
FILED
OCT 25 2000
CLERK

(13) (13)

Nos. 99-1687 and 99-1728

IN THE

Supreme Court of the United States

GLORIA BARTNICKI and ANTHONY F. KANE, JR.,
Petitioners,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

UNITED STATES OF AMERICA,
Petitioner,

v.

FREDERICK W. VOPPER, *et al.*,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT JACK YOCUM

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th St., N.W.
Washington, DC 20008

FRANK J. ARITZ
23 West Walnut St.
Kingston, PA 18704

THOMAS C. GOLDSTEIN
Counsel of Record
AMY HOWE
THOMAS C. GOLDSTEIN, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

Counsel for Respondent Jack Yocum

October 25, 2000

BEST AVAILABLE COPY

59pp

QUESTION PRESENTED

Whether, consistent with the First Amendment, a person who violated no laws and was wholly innocent in receiving the contents of a communication nonetheless may be held liable under 18 U.S.C. § 2511(1)(c) and its Pennsylvania analog for truthfully redisclosing the contents of that communication merely because he knows or has reason to know that the initial anonymous source may have acted unlawfully in obtaining the contents of that communication?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT 1
SUMMARY OF ARGUMENT 6
ARGUMENT 10

I. THE BAN ON REDISCLOSURE FAILS EVEN INTERMEDIATE SCRUTINY. 10

A. The Ban on Redisclosure Does Not Substantially Further A Governmental Interest in Reducing The Number of Illegal Interceptions. 11

B. The Statute Does Not Further Any Legitimate Governmental Interest Arising From The Negative Effects of The Disclosure of Intercepted Communications. 24

C. Respondents' Protected Speech Interest Outweighs Any Benefit from The Ban On Rediscloure. 30

II. PROHIBITIONS ON REDISCLOSURE OF TRUTHFUL INFORMATION MUST RECEIVE STRICT SCRUTINY. 38

A. The *Daily Mail* Principle Requires Strict Scrutiny in This Case. 38

B. Strict Scrutiny Should Apply Because The Redisclosure Ban Directly Restricts Speech. 42

C. The Redisclosure Ban Is Content Based and Purportedly Justified by The Communicative Impact of Speech. 47

CONCLUSION 50

TABLE OF AUTHORITIES

Pages

Cases

Blount v. *Rizzi*, 400 U.S. 410 (1971) 35

Boehner v. *McDermott*, 191 F.3d 463 (CADC 1999), *pet. for cert. pending*, No. 99-1709 12

Bose Corp. v. *Consumers Union*, 466 U.S. 485 (1984) 37

Butterworth v. *Smith*, 494 U.S. 624 (1990) 43, 47

City of Erie v. *Pap's A. M.*, 120 S. Ct. 1382 (2000) 43

Cohen v. *Cowles Media Co.*, 501 U.S. 663 (1991) 44, 45

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 33

Crowell v. *Benson*, 285 U.S. 22 (1932) 36

First Nat'l Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 27

Florida Star v. *B.J.F.*, 491 U.S. 524 (1989) 9, 33, 38, 40

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) 37

Harper & Row, Publishers v. *Nation Enters.*, 471 U.S. 539 (1985) 28, 29

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) 28

Jaffee v. *Redmond*, 518 U.S. 1 (1996) 29

Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 (1978) 13, 41

Miami Herald Publ'g Co. v. *Tornillo*, 418 U.S. 241 (1974) 47

NAACP v. *Button*, 371 U.S. 415 (1963) 43

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 37

New York Times Co. v. *United States*, 403 U.S. 713 (1971) 42
New York v. *Ferber*, 458 U.S. 747 (1982) 21, 22
Nixon v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897 (2000). 19, 43
Osborne v. *Ohio*, 495 U.S. 103 (1990) 21, 22
Pacific Gas & Elec. Co. v. *Public Utils. Comm'n*, 475 U.S. 1 (1986) 28
Peavy v. *WFAA-TV*, 221 F.3d 158 (CA5 2000) 12
Pennsylvania Bd. of Probation & Parole v. *Scott*, 524 U.S. 357 (1998) 23
Procunier v. *Martinez*, 416 U.S. 396 (1974) 46
Reno v. *ACLU*, 521 U.S. 844 (1997) 33
San Francisco Arts & Athletics, Inc. v. *United States Olympic Comm.*, 483 U.S. 522 (1987) 46
Schneider v. *State*, 308 U.S. 147 (1939) 43
Smith v. *Daily Mail Publ'g Co.*, 443 U.S. 97 (1979).. 9, 36, 38
Swidler & Berlin v. *United States*, 524 U.S. 399 (1998) 29
Turner Broadcasting Sys. v. *FCC*, 512 U.S. 622 (1994)46, 47, 50
United States v. *Alaska*, 521 U.S. 1 (1997) 45
United States v. *Bright*, 517 F.2d 584 (CA2 1975) 20
United States v. *Eichman*, 496 U.S. 310 (1990) 25
United States v. *National Treasury Employees Union*, 513 U.S. 454 (1995) 13
United States v. *Nixon*, 418 U.S. 683 (1974) 29
United States v. *O'Brien*, 391 U.S. 367 (1968) .. 10, 43, 44, 49
United States v. *Playboy Entertainment Group*, 120 S. Ct. 1878 (2000) 30

Statutes

18 Pa. Cons. Stat. § 5701 ..... 1, 4
18 Pa. Cons. Stat. § 5703(2) 43

18 U.S.C. § 1702 ..... 20, 21
18 U.S.C. § 1708 ..... 20, 21
18 U.S.C. § 2510 ..... 1, 4
18 U.S.C. § 2510(1) 5, 25
18 U.S.C. § 2510(2) 25
18 U.S.C. § 2510(8) 5, 29, 30
18 U.S.C. § 2510(12) 25
18 U.S.C. § 2511 13
18 U.S.C. § 2511(1) 30
18 U.S.C. § 2511(1)(a) 13
18 U.S.C. § 2511(1)(c) 4, 11, 42
18 U.S.C. § 2511(4)(b) 27
18 U.S.C. § 2512 43
18 U.S.C. § 2512(1) 13
18 U.S.C. § 2520 ..... 4, 13
50 U.S.C. § 1801(f) 16
50 U.S.C. § 1809 15
50 U.S.C. § 1809(a)(2) 16

Other Authorities

Cellular Privacy, 1997: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Comm. (1997) 26
David Hess, *House Votes to Outlaw Eavesdropping on Cellular-Phone Calls*, KNIGHT-RIDDER/TRIB. NEWS SERV., Mar. 5, 1998 14
J. Scott Orr, *Legal Signals Get Crossed Listening In On Cellular Calls*, STAR TRIB. (Minneapolis, MN), Sept. 14, 1997, at 4D 25

Jeffrey Silva, *Congress Finds Everyone Has Their Own Ideas on Eavesdropping*, RADIO COMM. REP., Feb. 10, 1997, at 10 13

M.E. Kabay, *The Year-In-Review*, INFO. SECURITY, Dec. 1998, at 16 31

Michael Krantz, *Guess Who's Listening*, TIME, Jan. 27, 1997, at 30 31

Petition for Certiorari, No. 00-276, *United States* v. *United Foods* 28

Privacy Hearings Turn Into Propaganda Battle Between PCS and Cellular, PCS WK., Feb. 12, 1997 ..... 25, 26

Reno: Leak Law Should Not Be Used Against Media, UNITED PRESS INT'L, June 15, 2000 15

S. REP. NO. 90-1097, 90th Cong., 2d Sess. (1968) 48

Stefanie Scott, *Wireless Service Providers Compete for Appleton, Wis.-Area Cell Phone Users*, POST-CRESCENT, Oct. 3, 2000 14

Steven S. Woo, *Cordless But Still Connected*, DES MOINES REG., Apr. 25, 2000 14

Transcript of Attorney General Reno's June 15, 2000 News Briefing, *available from* FDCH POLITICAL TRANSCRIPTS 15

Vernon Loeb, *Anti-Leak Bill Alarms Media, Divides GOP*, WASH. POST, Oct. 24, 2000, at A2 15

William Glanz, *Wireless-Phone Wars Could Grow If MCI Enters Fray*, WASH. TIMES, Apr. 7, 1999, at B8 14

BRIEF FOR RESPONDENT JACK YOCUM

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 200 F.3d 109. The opinions and orders of the district court (Pet. App. 59a-76a) are unreported.

JURISDICTION

Jurisdiction is as stated in the petitioners' briefs.

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution and select portions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.*, are reproduced in the appendix to the Brief for the United States. U.S. Br. 1a-10a. Select portions of the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. Cons. Stat. § 5701 *et seq.*, are reproduced in the Brief for Petitioners Bartnicki and Kane. Bartnicki Br. 3-4.

STATEMENT

This case originated when respondent Jack Yocum found in his mailbox an audio tape, dropped off by an unknown person.[1] Yocum played the tape, on which senior representatives of a local teachers' union, petitioners Bartnicki and Kane, were heard having a conversation. Bartnicki states that she is on a cellular phone. Yocum recognized their voices because he was a leader of a loosely organized group of residents opposed to certain of the teachers' salary demands.

On the tape, Bartnicki and Kane discuss a number of issues relating to ongoing negotiations (referring, for example,

---

[1] The Solicitor General's assertion that it was necessarily the intercepting party who provided the tape to Yocum, U.S. Br. 7, is not supported by the record. No one knows who gave the tape to Yocum. JA 53. Accord Bartnicki Br. 5.

to certain school board representatives as "nitwits," JA 47). Discussing the size of a salary proposal anticipated from the board, Kane then states: "If they're not gonna move for three percent, we're gonna have to go to their, their homes. . . To blow off their front porches, we'll have to do some work on some of those guys." *Id.* 46.[2]

The next day, Yocum delivered the tape to a local radio talk show host, respondent Vopper, who made a copy. Yocum, who had himself been the subject of threats relating to the union negotiations, JA 110-13, provided the tape out of concern for the safety of school board members and their families, *id.* 36, 54, 120, believing that the police would not take action because no violence had yet occurred, *id.* 54. See also *id.* 118 ("I could not morally live with the fact that what if this did happen, if I did nothing."). Yocum also disclosed the tape to certain school board members and one other reporter. Other members of the media came into possession of the tape as well, JA 100, quite possibly from some other source.

Several months after Yocum first disclosed the tape to Vopper, the union largely prevailed on its salary demands in nonbinding arbitration. *Id.* 81-82, 105-06. At that point, and over the subsequent weeks, Vopper played all or part of the tape on the radio in the context of discussing the labor situation in the school district.

Since well before the arbitral ruling, the school board negotiations "were markedly contentious, generated significant public interest and were frequently covered by the news media." No. 99-1728, Pet. App. ("Pet. App.") 2a.[3] After Vopper

---

[2] Ironically, although petitioners strongly protest in this case that privacy is inviolate, on the tape they discuss confidential information apparently leaked from the school board's negotiators. JA 43.

[3] See also JA 79 (Petitioner Kane, in response to the question "Would it be fair to say that this is a labor dispute that got a lot of media attention?": "Yes, I would say yes. Very much so."); *id.* 92 (petitioner Kane, in response to the question "[W]ould it be fair to characterize it as a very contentious negotiation that was still going on between the district and the union?": "Yes, yes."); *id.* 126 (deposition of television news anchor: "Well, I knew the story; it was a big story going on. It was controversy. It was, you know, a newsworthy story at the time, that this school district was trying to–the schoolteachers were trying to get a raise, and the school board was not giving in. So it was a big story at the time.").

played the tape, a number of television stations and newspapers either played excerpts or reported transcripts of the conversation, treating both the statements and the fact that they had been disclosed as important news stories. JA 85-86 (there were "several days of stories concerning [the tape] in the newspapers" and "on the television stations"); *id.* 156. For its part, the union, through its representatives, actively and successfully presented its views in the press, including the view that Kane's statement about "blow[ing] off their front porches" was simple hyperbole. *Id.* 80, 82, 91, 95-97, 132, 135, 141.

Petitioners Bartnicki and Kane also sued Vopper and entities related to the radio station under the federal and Pennsylvania wiretapping statutes. JA 12-18 (complaint). When discovery proceedings revealed that Yocum had provided the tape to Vopper, they amended their complaint to name Yocum as a defendant as well. *Id.* 24-30. They also held out the possibility of suing the other media outlets that had disclosed the contents of the tape. JA 133 (petitioner Kane holding out the possibility of suing "WDAU, Channel 22," "Channel 16," "the *Citizens' Voice*," and "the *Times Leader*").

Bartnicki and Kane specifically alleged that Respondent Yocum "intentionally disclosed the tape to several individuals and media sources including but not limited to, [Vopper]." JA 26-27.[4] They also alleged that Yocum "knew or had rea-

---

[4] Although petitioners state that the complaint alleged that Yocum had "used" the tape, U.S. Br. 7, Bartnicki Br. 9, that is not correct: the only act attributed to respondent Yocum was that he had "disclosed the tape," JA 26-27. See also Pet. App. 20a, 21a n.2. Petitioners, on the pages of the

son to know that the private telephone conversation between Bartnicki and Kane was obtained surreptitiously through the illegal interception of their telephone conversation." *Id.* 27 (capitalization omitted). (The complaint does not allege how the interception occurred and, indeed, it is not known to this day how the conversation was recorded.[5]) Petitioners asserted claims for statutory, compensatory, and punitive damages, as well as attorney's fees and litigation costs. *Id.* 28, 30.

Petitioners specifically asserted a claim under a provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 as amended, 18 U.S.C. § 2510 *et seq.* ("Title III"), and a parallel Pennsylvania wiretapping statute, 18 Pa. Cons. Stat. § 5701 *et seq.* The relevant provisions of the federal statute subject to criminal liability, and create a private right of action against, "any person who * * * intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection." 18 U.S.C. §§ 2511(1)(c), 2520. By its terms, the statute thus prohibits not only disclosure of the contents of the communication by the person who intercepted the communication, but also *re*-disclosure of those contents by any other person indefinitely into the future. (Hereinafter, for ease of reference, we refer to the state and federal provisions collectively as "the redisclosure prohibition.").

---

complaint they cite, merely quoted all of the prohibitions of the state and federal wiretapping acts. JA 27-28, 29-30.

[5] The assertion that the conversation was recorded with the use of a scanner that intercepted the radio component of Bartnicki's cell phone, see Bartnicki Br. 5, is not established by the record. It is possible that a wiretapping device was installed on Kane's phone or that Kane was using a cordless telephone. Petitioners' complaint encompasses all of these possibilities. JA 26.

Under the federal wiretapping act, conventional and cellular telephone calls are defined as "wire communications." 18 U.S.C. § 2510(1). The "contents" of such communications are defined broadly to "include[] any information concerning the substance, purport, or meaning of that communication." *Id.* § 2510(8).

The district court refused to dismiss the complaint on First Amendment grounds, but certified the case to the Third Circuit, which reversed. Pet. App. 42a. The court of appeals explained that the question before it was whether "the First Amendment precludes imposition of civil damages for the disclosure of portions of a tape recording of an intercepted telephone conversation containing information of public significance when the defendants * * * played no direct or indirect role in the interception." *Id.* 2a. The court concluded that although the wiretapping act was in large part enacted to protect privacy, a content-based interest that triggers strict scrutiny, *id.* 25a-27a, it should be evaluated instead under intermediate scrutiny because of the government's asserted content-neutral interest in reducing the number of illegal interceptions, *id.* 27a-28a.

Applying intermediate scrutiny, the court of appeals held that the *re*disclosure prohibition could not constitutionally be applied in the circumstances of this case. The court explained that petitioners had totally failed to establish that a ban on redisclosure would reduce the number of interceptions:

> The connection between prohibiting third parties from using or disclosing intercepted material and preventing the initial interception is indirect at best. The United States has offered nothing other than its *ipse dixit* in support of its suggestion that imposing the substantial statutory damages provided by the Acts on Yocum or the media defendants will have any effect on the unknown party who intercepted the Bartnicki-Kane conversation. Nor has the United States offered any basis

for us to conclude that these provisions have deterred any other would-be interceptors.

Pet. App. 33a-34a. The court explained that this wholly speculative benefit was insufficient to justify a prohibition on important speech:

> The public interest and newsworthiness of the conversation broadcast and disclosed by the defendants are patent. In the conversation, the president of a union engaged in spirited negotiations with the School Board suggested "blow[ing] off [the] front porches" of the School Board members. Nothing in the context suggests that this was said in anything other than a serious vein. Certainly, even if no later acts were taken to follow through on the statement, and hence no crime committed, the fact that the president of the school teachers' union would countenance the suggestion is highly newsworthy and of public significance.

Id. 36a-37a.

This Court subsequently granted and consolidated petitions for certiorari by the plaintiffs and by the United States.

SUMMARY OF ARGUMENT

1. Prohibiting a wholly innocent speaker from redisclosing truthful information on a matter of central public concern, merely because the initial interception and disclosure of such information may have been due to the wrongdoing of an unrelated third party, violates the First Amendment and cannot survive even intermediate constitutional scrutiny.

a. Banning the redisclosure of the contents of unlawfully intercepted communications or information derived therefrom does not substantially further any government interest in reducing the number of illegal interceptions by unrelated third parties. The raw speculation that there exists a "market" for the redisclosed contents of intercepted communications has no basis in the evidence that was before Congress or in any

findings made by Congress. Petitioners also fail to establish that any hypothetical "market" for intercepted communications is not adequately addressed by the nonspeech restrictions on intercepting communications or procuring such intercepts, or by technological developments, such as digital cellular and cordless phones, that have minimized the ability to intercept communications at all. Furthermore, any supposed need for the ban on redisclosure to reduce the number of interceptions is belied by the *absence* of such a ban in other provisions of federal law relating to the unauthorized release of far more sensitive materials, including national security information.

Even assuming the hypothetical "market" for intercepted communications existed, the redisclosure ban would not effectively serve the claimed interest in reducing the number of interceptions. The ban on redisclosure could only conceivably affect targeted interceptions driven by nonmonetary demand and performed by anonymous and risk-taking persons already willing to illegally intercept communications.

The analogies petitioners draw to stolen mail, child pornography, and stolen property all fail. There is no law prohibiting the disclosure or redisclosure of stolen mail. Conversely, while it is illegal to possess stolen mail, it is not illegal to receive or possess intercepted communications. It is likewise illegal even to possess child pornography, and in that case there is actual evidence of an economic market for such materials. The information in this case is also of core First Amendment value, unlike child pornography. The existence of a market for stolen property is also well established and economically driven, unlike the speculative market for redisclosed intercepts.

b. Any other claimed interests arising from the redisclosure of intercepted communications are based on the communicative impact of such disclosures and hence independently cause the redisclosure ban to fail. Furthermore, the ban on redisclosure is substantially overbroad in relation to the al-

leged privacy interests, as it applies in many instances regardless of any reasonable expectation of or concern for privacy on the part of the intercepted party. The claimed interest in promoting use and development of new communications technology is also driven by concerns over the communicative impact of disclosures and the reactions of persons to such disclosures. Furthermore, the statute is not remotely tailored to such an interest, in fact providing *lower* penalties where interception targets the supposedly new technologies being protected. Finally, any interest in promoting certain types of private speech and avoiding a supposed chill from private rather than government conduct is itself offensive under the First Amendment, does not incorporate protection for First Amendment rights as does the "fair use" doctrine in the copyright context, and is surely not of a constitutional magnitude.

c. Whatever incidental and poorly served benefits might be attributed to the ban on redisclosure, the ban's substantial direct restriction on speech of the highest First Amendment value and its indirect chill on a broad array of protected speech that does not cause any cognizable harm more than outweigh the government interests for purposes of intermediate scrutiny. Indeed, the very nature of the redisclosures targeted by the ban virtually guarantees that the speech directly and indirectly affected will be information of public significance. And because the ban applies not just to the verbatim communication itself, but even to facts abstracted from that communication, and because of its imprecise and broad wording, the sweep of the chill in discussion of public matters will be tremendous. It is not for this Court to adopt the numerous amendments proposed by petitioners in an attempt to narrow the plain breadth of the statute's terms. Rather, such narrowing determinations are for Congress, and it is not at all clear that Congress would reenact even a narrower ban on redisclosure, particularly in light of recent legislative decisions rejecting such bans in other, more serious, contexts.

2. Alternatively, the redisclosure ban should be invalidated under strict scrutiny as a direct and content-based restriction on truthful speech addressing matters of public import by a person having engaged in no underlying wrongdoing. There is no credible claim that the ban can survive strict scrutiny.

a. Under this Court's decisions in *Smith* v. *Daily Mail Publishing Company*, 443 U.S. 97 (1979), and *Florida Star* v. *B.J.F.*, 491 U.S. 524 (1989), the redisclosure provision is subject to strict scrutiny because, regardless of any upstream wrongdoing by intercepting parties, respondents' receipt and possession of the information in question were entirely lawful, and hence the truthful redisclosure of that information is fully protected. This case is thus indistinguishable from *Florida Star*, in which the initial release of the information to the media was wrongful on the part of the government, but the media's receipt of that information was lawful. This case thus does not present the question whether a person who obtains information through his own wrongdoing may be prohibited from disclosing that information.

b. Even aside from the *Daily Mail* principle, strict scrutiny applies because the redisclosure ban is a direct prohibition on protected speech. The burden on speech in this case is neither an incidental effect of a regulation on nonspeech conduct nor a regulation of the time, place, and manner of speech. Rather, it results from a direct and targeted suppression of the "disclosure" of the contents of certain communications – an inherently and exclusively communicative act. The redisclosure ban thus targets pure speech and necessarily has as its purpose the suppression of free expression.

c. The redisclosure ban is also subject to strict scrutiny because it is both content based and justified by reference to the communicative impact of redisclosures. The statute itself expressly prohibits the disclosure of the "contents" of an intercepted communication, and thus can only be applied by examining the content of both the challenged speech and the

allegedly intercepted communication. In addition, much of the justification for the ban turns on the communicative impact of the redisclosure on both the listeners and the parties to the intercepted communication. Indeed, petitioners repeatedly note that the specific and unique justification for the redisclosure prohibition, separate from the ban on interception itself, is the compounding effect of each further communication of the intercepted information. Finally, the redisclosure ban is prone to both content- and viewpoint-based enforcement and is in fact being enforced in this case in a viewpoint-discriminatory manner. Although many media outlets redisclosed the intercepted communication, petitioners only sued the limited media respondents in this case because of disagreement with their past speech. And although numerous individuals discussed, and hence disclosed, the contents of the intercepted communication, the only nonmedia individual sued was respondent Yocum, a political opponent of the teachers' union.

There being multiple grounds for applying strict scrutiny and no colorable claim that the redisclosure ban satisfies such scrutiny, the challenged law violates the First Amendment.

ARGUMENT

I. THE BAN ON REDISCLOSURE FAILS EVEN INTERMEDIATE SCRUTINY.

The Court need not in this case determine the degree of scrutiny applicable to the redisclosure provision of Title III, because under the most lenient standard advanced by petitioners – intermediate scrutiny – the statute is invalid. A statute will survive intermediate scrutiny only if "it furthers an important or substantial governmental interest" that "is unrelated to the suppression of free expression" and any restriction of "First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). The redisclosure prohibi-

tion fails on every count: it accomplishes essentially nothing; any benefits it might secure come at the direct expense of free speech; and it prohibits and chills vastly more protected speech than necessary to accomplish the interests asserted by petitioners.

A. The Ban on Redisclosure Does Not Substantially Further A Governmental Interest in Reducing The Number of Illegal Interceptions.

Petitioners assert that the redisclosure ban reduces the number of illegal interceptions by eliminating "the 'market' for illegally intercepted communications." U.S. Br. 14. Without such a prohibition, petitioners argue, there will be an incentive to engage in interceptions, the contents of which could later be "laundered" through third parties. But there is no such "market" for intercepted communications, and the redisclosure prohibition could not have any substantial effect on such a "market" if it did exist.

1. ***The ban on redisclosure is not necessary to eliminate a "market" for intercepted communications.*** Petitioners are not correct that the ban on redisclosure is necessary to eliminate a "market" for the redisclosed contents of intercepted communications. First and foremost, petitioners' briefs invent such a "market" out of whole cloth. Congress enacted Title III, including the disclosure provision, 18 U.S.C. § 2511(1)(c), in 1968. Not only did Congress and the President's Commission on Law Enforcement and Administration of Justice fail to make any findings that such a market existed, but they did not hear testimony confirming or even suggesting the potential for such a market to arise. Similarly, when Congress extended the statute to cover electronic communications in 1986, it did not receive any evidence or make any findings to that effect. If redisclosure were a realistic problem, Congress would have taken testimony, including from the executive branch, that the prohibition was necessary in order to prevent circumvention of the underlying ban on interception. But it heard no such testimony and made no such finding.

The testimony quoted by petitioners (U.S. Br. 36 & n.11; Bartnicki Br. 27-33) relates only to the fact that cellular calls were being *intercepted*, not that the interceptions were being disclosed by anyone other than the person who conducted the initial interception.

The absence of any pressing need for the redisclosure ban in the circumstances of this case is confirmed by petitioners' continuing inability to adduce any evidence to establish, even post hoc, that absent the ban on redisclosure there would be a "market" for intercepted communications or that interceptions would otherwise be "laundered" through third parties. Nor have the plaintiffs in the two other recent related cases made any such showing. See generally *Peavy* v. *WFAA-TV*, 221 F.3d 158 (CA5 2000); *Boehner* v. *McDermott*, 191 F.3d 463 (CADC 1999), *pet. for cert. pending*, No. 99-1709. Petitioners' repeated reliance on a statement by a panel of the D.C. Circuit in the *Boehner* case that the redisclosure provision prevents criminals from "literally launder[ing] illegally intercepted information," 191 F.3d at 471, is nothing more than bootstrapping: the panel majority in that case simply accepted the identical unsupported assertions that petitioners now repeat in this Court. The Third Circuit thus was quite right in concluding in this case that petitioners' claims regarding the existence of a "market" for intercepted communications are nothing more than "*ipse dixit*" and an "unsupported allegation that the statute is likely to produce the hypothesized effect." Pet. App. 33a-34a.

Petitioners' plaint (*e.g.*, U.S. Br. 41) that it would not be fair or realistic to require support in the record would, if accepted, represent a serious retreat from this Court's uniform insistence that speech restrictions be justified by actual evidence, not by speculation and strained hypothesis invented by the counsel to self-interested litigants. The government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *United States* v. *National Treasury Employees Union*, 513 U.S. 454, 475 (1995) (citation omitted); see also *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 841 (1978) ("The Commonwealth has offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined.").

Petitioners also fail to establish why such a hypothetical "market" for intercepted communications would not be addressed sufficiently by the other stringent provisions of Title III. A "market" contemplates the existence of "demand," but an unchallenged provision of the statute directly targets any genuine demand by making it illegal to "procure[] any other person to intercept or endeavor to intercept" a communication. 18 U.S.C. § 2511(1)(a). That same provision also targets any "supply" of intercepted communications, establishing criminal fines, jail sentences, and civil liability for the act of interception and for any disclosure *by the intercepting party*. *Id.* Any supposed supply of intercepted communications is further addressed by a provision targeting the means of interception: criminalizing the manufacture, sale, possession, or even advertising of equipment that is "primarily useful for the purpose of the surreptitious interception of wire, oral, or electronic communications." *Id.* § 2512(1). Violators face substantial fines and jail terms, as well as statutory, compensatory, and punitive damages. *Id.* §§ 2511, 2520.

Furthermore, private parties are themselves actively addressing the issue of intercepted communications. For example, petitioners' concern in this case apparently arises from the ability to intercept, without detection, the radio component of analog cellular and cordless telephone calls. But the market for digital cellular phones, which cannot be intercepted in that fashion,[6] is booming and is destined to supplant

---

[6] See Jeffrey Silva, *Congress Finds Everyone Has Their Own Ideas on Eavesdropping*, RADIO COMM. REP., Feb. 10, 1997, at 10 ("Jay Kitchen, president of the Personal Communications Industry Association, said the

the earlier generation of analog phones.[7] Similarly, the current generation of cordless telephones employs systems of scrambling and shifting channels that are far more difficult to intercept.[8] In addition to curtailing any supposed supply of intercepted communications, those technological developments contradict petitioners' claim that the redisclosure prohibition is needed for innovation or use of new communications technologies.

Finally, petitioners' insistence that the redisclosure prohibition is needed in order to prevent the "laundering" of illegal intercepts is belied by other provisions of federal law. For example, the redisclosure of even sensitive national security information does not give rise to criminal or civil liability. Of

---

new digital personal communications services will solve the [eavesdropping] problem because the next-generation pocket phones are more secure than analog cellular phones."); David Hess, *House Votes to Outlaw Eavesdropping on Cellular-Phone Calls*, KNIGHT-RIDDER/TRIB. NEWS SERV., Mar. 5, 1998 ("Digital PCS phones already have a built-in safeguard against eavesdropping, because they transmit calls as encrypted computer data. Anyone using a scanner to listen to a digital call would hear only noise."); William Glanz, *Wireless-Phone Wars Could Grow If MCI Enters Fray*, WASH. TIMES, Apr. 7, 1999, at B8 (explaining that transmissions by digital phones "are more secure" because "[w]hile analog technology transmits straight voice signals, digital technology translates them into the binary code of ones and zeroes and transmits that").

[7] See Stefanie Scott, *Wireless Service Providers Compete for Appleton, Wis.-Area Cell Phone Users*, POST-CRESCENT, Oct. 3, 2000 (indicating that "about 50 percent of [mobile phone] users have digital phones, with the number growing rapidly" and that "[a] few analog phones still exist, but most users upgrade their phone every year to three years and only digital upgrades are available"); Glanz, *supra* (noting (in April 1999) that "[w]ireless customers are increasingly choosing digital over analog phones. Of the 69.2 million subscribers on Dec. 31 [1998], 18.3 million – or 27.8 percent – were digital phone users. That's up 183 percent from 6.4 million digital subscribers last year.").

[8] *E.g.*, Steven S. Woo, *Cordless But Still Connected*, DES MOINES REG., Apr. 25, 2000 (noting that "[d]igital cordless phones are more secure" than analog cordless phones because "[t]hey constantly shift and scramble the signal to deter eavesdroppers").

particular note, after apparently giving considerable attention to the First Amendment's requirements, Congress this year passed (and the President is expected to sign) a bill, H.R. 4392, that for the first time broadly criminalizes leaks of classified information but that notably does *not* include a ban on redisclosure. See generally Vernon Loeb, *Anti-Leak Bill Alarms Media, Divides GOP*, WASH. POST, Oct. 24, 2000, at A2. Although such unauthorized disclosures are of far greater concern than the generic communications covered by Title III, the Department of Justice nonetheless opposed extending the statute further *on First Amendment grounds*. See *Reno: Leak Law Should Not Be Used Against Media*, UNITED PRESS INT'L, June 15, 2000 ("Attorney General Janet Reno Thursday said any federal law making leaks of classified information to the news media a felony should not be used against reporters. * * * [S]he said she doesn't oppose leak legislation 'that will be useful,' but 'I think everyone wants to focus on appropriate First Amendment concerns.'"); see also Transcript of Attorney General Reno's June 15, 2000 News Briefing, *available from* FDCH POLITICAL TRANSCRIPTS (stating, *inter alia*, "[W]e have to address how you walk the line between a free press able to publish and encourage public debate and how we protect the national security of this country").

Indeed, the redisclosure prohibition of Title III stands basically alone in American law, such that Congress has not seen the necessity to enact parallel measures in the innumerable areas in which confidential information may fall into the hands of the media or other private parties. The closest analog identified by the Solicitor General, U.S. Br. 6, is a statute prohibiting the use or disclosure of information obtained as a result of national security intelligence measures. 50 U.S.C. § 1809. But liability under that statute is much narrower than under Title III. The defendant must know or have reason to know that the interception was conducted "under color of law" without authorization under the statute's detailed proce-

dures, as well as that the parties to the intercepted communication had "a reasonable expectation of privacy [such that] a warrant would be required for law enforcement purposes." *Id.* §§ 1809(a)(2), 1801(f).

2. *The ban on redisclosure cannot effectively reduce the number of interceptions.* Even if the "market" for intercepted communications imagined by petitioners and never identified by Congress existed, it would be exceedingly limited in scope, unlike any *actual* "market," and devoid of any realistic class of suppliers or consumers. Extinguishing any such "market" could not possibly justify the scope of the ban on redisclosure or outweigh its severe burden on protected speech.

First, petitioners' reduced-demand theory imagines a "market" consisting of interceptions targeted at specific persons. In particular, petitioners do not maintain that the ban on redisclosure will deter persons who intercept analog cellular calls by listening to radio scanners out of simple "nosiness." Those persons no doubt will continue to engage in that conduct for their own personal gratification regardless whether they can later provide the contents of an interception to a third party for redisclosure.

Any remaining number of "targeted interceptions" is very small because they are exceedingly difficult to conduct. The record evidence in this case establishes that it is quite unlikely that someone could "target" a particular cellular conversation because analog cellular calls can be carried on any of a number of different channels, which themselves shift in the middle of a call as the phone moves between "cells." JA 159-62. And, as noted, it is far more difficult still – if not impossible – to intercept a digital cellular phone call.

Second, petitioners' claimed need to attack the demand for information imagines a "market" supplied by totally anonymous, risk-taking intercepting parties. That is so because a person supplying a "market" for public disclosures

cannot be confident of maintaining anonymity. Any contact between the interceptor and the recipient of an intercepted communication creates an evidentiary trail that will lead back to the original interception. It thus simply is not true that the ban on redisclosure is necessary to prevent someone from "laundering" an interception by giving it to a friend or family member.

In the *Boehner* case, for example, the plaintiffs were easily able to identify the couple who intercepted the original cell phone call. Similarly, in this case, the plaintiffs identified respondent Yocum by taking discovery from the media respondents. They then deposed respondent Yocum and questioned him extensively regarding who might have given him the intercepted communication, and who would have had an incentive or the technology to intercept the call. The government, of course, has access to its even greater criminal investigatory powers. Even "anonymous" interceptors cannot be sure that they would be safe, not only because they may be the natural target of suspicion, but also because they may leave a trail of physical evidence, including fingerprints, on the materials they disclose.

Third, any supposed market impact from prohibiting redisclosure must further imagine that the anonymous, risk-taking interceptors are also totally magnanimous. As noted *supra* at 13, the statute separately prohibits any person from soliciting an illegal interception. And both the attempt to arrange some financial exchange and the exchange itself would also create evidentiary trails leading back to the initial, illegal interception. This case, moreover, presents only the question whether the redisclosure prohibition constitutionally may be applied to a party who played "no direct or indirect role in the interception," including by *encouraging* the interception. Pet. App. 2a. To the extent that Congress enacted the redisclosure provision in an effort to prevent economically motivated interceptions, the redisclosure provision is unnecessary and that

interest is not furthered by applying it in circumstances such as this case.

Fourth, petitioners' market theory imagines interceptions conducted only with the intent that they be disclosed broadly on a *secondary* market. But an intercepting party can always provide the contents of an interception directly to a specific group of people without exposing the recipients to liability. Title III (unlike laws involving the mails, stolen property, and child pornography, discussed *infra* at 19-23) does not criminalize the *receipt* or *possession* of an unlawfully intercepted communication. Thus, a person who seeks to embarrass a neighbor or to use intercepted information for commercial advantage can simply distribute or make use of the information himself. Furthermore, a person committed to distributing an unlawful interception broadly can himself use primary rather than secondary outlets, including distributing the contents of the interception anonymously through the Internet, without the need to provide the interception to a third party who would then *re*disclose it.

Recognizing that the redisclosure provision necessarily targets the secondary market for information has two other important consequences. The ban on redisclosure generally would target communications by the media, who are the most common vehicle for broadly distributing information. But the media "buyers" hit by the redisclosure provision are hardly natural or frequent consumers of the *anonymous* intercepts that supposedly create the need for demand-reducing penalties on speech. For example, a news outlet will not have any way of confirming the authenticity of a tape recording without the ability to speak to the anonymous intercepting party and will be disinclined to broadcast it for that reason. In addition, the anonymous intercepting party cannot have any confidence (given that the matter will be out of his control) that further disclosure will actually occur if he does provide the contents of the interception to a third party, thereby mini-

mizing the incentive to take the risk of even engaging in the illegal interception in the first place.

Fifth and finally, the supposed need for banning downstream "demand" imagines a "market" supplied by only intercepts of analog cellular and cordless communications, which petitioners assert are very difficult to stop directly because (unlike the physical intrusion required to install a wiretap or "bugging" device) they can be conducted remotely (as with a radio scanner). But this rationale fails to justify banning the redisclosure of the contents of other communications, including particularly conventional telephones, a point relevant here because it is not certain that the cellular component of the call was intercepted in this case. See *supra* at 4 n.5.

Ultimately, then, petitioners have it precisely backwards in invoking this Court's statement that "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon* v. *Shrink Mo. Gov't PAC*, 120 S. Ct. 897, 906 (2000). Unlike the question of campaign finance regulation at issue in *Nixon*, the redisclosure prohibition of Title III rests on novel and implausible assumptions unsupported by any legislative record, premises not followed in other provisions of federal law, and highly questionable leaps of logic. Hence, contrary to petitioners' wishful thinking that "*no* such evidentiary showing is required" in this case, U.S. Br. 41 (emphasis added), the "quantum of empirical evidence needed to" justify the ban on redisclosure must "vary *up*" in order to pass muster under the First Amendment.

3. *The analogies offered by petitioners are not persuasive.* Petitioners point to three areas – theft of the mails, child pornography, and stolen property – in which they maintain that legislatures or this Court have determined that a ban on the subsequent possession or use of an item will deter some primary illegality. But the legal regimes in those other areas are not in fact analogous and, in any event, they cannot estab-

lish the premise of petitioners' argument: that there is a "market" for intercepted communications that must be deterred. Nor do the examples offered by petitioners address the critical question whether the ban on redisclosure prohibits and chills protected speech.

Petitioners first draw a parallel to the protection afforded the contents of the U.S. mails, arguing that Congress intended that when individuals engage in wire, oral, or electronic communications, "those channels will be as secure as the mails," U.S. Br. 14, because electronic communications are "the modern equivalents of letters," *id.* 37. That analogy is bizarre. The mail theft statutes – unlike the wiretapping statutes – contain no analogous prohibition on *disclosing* the contents of stolen mail. See 18 U.S.C. §§ 1702, 1708. Thus, if respondent Yocum had received a copy of a letter stolen from the mails in which petitioner Kane had raised the possibility of "blowing the porches off" of the homes of school board members, he lawfully could have disclosed that letter.[9] Conversely, Title III, unlike the mail theft statutes, does not criminalize the mere receipt or possession of an intercepted communication.[10]

---

[9] The Solicitor General asserts that greater protection is required in the context of illegal interceptions than the mails, because the latter can be stolen only with "the physical access that ordinarily permits prevention and detection." U.S. Br. 37. Not only did Congress make no such finding, but that argument makes no sense of Title III, which imposes *higher* penalties for interceptions performed through physical wiretaps and bugging devices than by remote electronic interceptions. See *infra* at 27.

[10] Even if the mail theft statutes prohibited disclosure of stolen mail, they would not carry the same risk of chilling protected speech. The wiretapping statutes apply to anyone with "reason to know" that the communications were unlawfully intercepted, but the mail theft statutes apply only to someone who actually *knows* that the mail at issue has been stolen. See 18 U.S.C. § 1708; *United States* v. *Bright*, 517 F.2d 584, 587 (CA2 1975). The mail theft statutes also provide only a criminal cause of action; they do not permit the subject of a media report based on stolen letters to bring a civil claim such as the one in this case. See 18 U.S.C. § 1702 (providing for fines and/or jail sentence not to exceed five years); *id.* § 1708 (same).

Petitioners next compare the ban on redisclosure to prohibitions on the receipt, possession, and distribution of child pornography, noting this Court's recognition that such provisions would help to eliminate the "market" for such materials. See *Osborne* v. *Ohio*, 495 U.S. 103 (1990); *New York* v. *Ferber*, 458 U.S. 747 (1982). That analogy is not apt because evidence in those cases established that there was an actual "market" for child pornography. See *Osborne*, 495 U.S. at 110 ("According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground * * * ."); *Ferber*, 458 U.S. at 760 ("While the production of pornographic materials is a low-profile, clandestine industry, the need to market the resulting products requires a visible apparatus of distribution. The most expeditious if not the only practical method of law enforcement may be to dry up the market for this material * * * ."). The actual and "visible" market for child pornography contrasts sharply with the total absence of any evidence regarding a market for redisclosure of illegally intercepted communications. Similarly, although this Court noted in *Ferber* that economic reasons underlie the creation and distribution of child pornography,[11] separate provisions of Title III address any economic motivations for the illegal interception of communications. See *supra* at 13.

Furthermore, *Ferber* and *Osborne* presented cases in which the speech at issue – child pornography – was acknowledged to have little or no First Amendment value. See *Ferber*, 458 U.S. at 762 ("The value of permitting live per-

---

[11] See 458 U.S. at 749 n.1 ("'Child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale.'" (quoting S. REP. NO. 95-438, at 5 (1977)); *id.* at 761 ("The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials * * * .").

formances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*."). And the child pornography statutes were unlikely to chill protected speech because the conduct prohibited (as well as the content of child pornography itself) was clearly defined. See *Osborne*, 495 U.S. at 116 ("That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration."); *Ferber*, 458 U.S. at 751 (statute prohibited knowing "produc[tion], direct[ion] or promot[ion] [of] any performance which includes sexual conduct by a child less than sixteen years of age"). The speech encompassed by Title III's redisclosure provision, by contrast, is itself of the highest value and lacks any such clear delineation from speech not implicating the statute's alleged concerns.

Finally, the child pornography statutes in *Ferber* and *Osborne* sought not only to prevent the initial creation of child pornography, but also to effect the destruction of existing child pornography by criminalizing its possession and viewing. See *Osborne*, 495 U.S. at 111 ("The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come. * * * . The State's ban on possession and viewing encourages the possessors of these materials to destroy them. * * * [E]ncouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."). In contrast, in the context of Title III, there is no non-content-based interest in destroying or preventing the publication of the already-intercepted communication.

Petitioners finally draw an analogy to statutes prohibiting the receipt, possession, or sale of stolen property. But, as in the case of child pornography, and in contrast with the wiretapping statutes, there is ample evidence of an economically motivated market for stolen goods. Furthermore, as with the stolen mails and child pornography, the *receipt* and *possession* of stolen goods are both prohibited. Furthermore, statutes prohibiting the receipt of stolen goods do not chill protected speech.

Not surprisingly, the most apt analogy is the one that petitioners do *not* draw: that between Title III's ban on redisclosure and the prophylactic exclusionary rule barring use of unconstitutionally obtained evidence. Just as petitioners claim that the redisclosure provision is necessary to remove the incentive to intercept communications, the exclusionary rule removes the incentive to engage in constitutionally infirm criminal investigatory practices. But as this Court has repeatedly confirmed (with the consistent urging of the Solicitor General), application of the rule is limited to circumstances in which it will have a significant deterrent effect, given the rule's significant social costs and the availability of alternative deterrents. *E.g.*, *Pennsylvania Bd. of Probation & Parole* v. *Scott*, 524 U.S. 357 (1998) (collecting cases).

Here, the balance of interests counseling against application of the redisclosure provision is far stronger than in the cases in which this Court has declined to extend the exclusionary rule. In the criminal investigatory context, the principal "social cost" of applying the exclusionary rule is its negative effects on the truth-seeking function of the judicial process. By contrast, the "social cost" of Title III's ban on redisclosure is a categorical prohibition that applies to (a) entirely truthful speech (b) on a matter of public interest that is deserving of the highest protection under the First Amendment (c) by a person or media outlet that has not engaged in the conduct that Congress sought to prevent – interception of communications. Moreover, Title III separately targets the illegal interception itself with the strongest possible "alternative deterrent" – criminal punishment – thus limiting the marginal benefit to be gained by forbidding redisclosure.[12]

---

[12] Even if petitioners were correct that the interceptor cannot be so deterred because he is anonymous, the "social cost" of the redisclosure pro-

B. The Statute Does Not Further Any Legitimate Governmental Interest Arising From The Negative Effects of The Disclosure of Intercepted Communications.

Petitioners assert that the ban on redisclosure also furthers two closely related interests arising from the impact of the public revelation of intercepted communications: reducing the instances in which private facts become public, and avoiding the sense of "violation" that supposedly occurs when individuals realize that their communications have been intercepted. As extensions of these interests, petitioners assert that confidence in new communications technologies is increased and that individuals will actually engage in more speech. Petitioners' arguments are unavailing. Not only are these interests impermissibly content-based, but the ban on redisclosure, which by its terms applies equally to both public and private matters and to both new and old technologies, is extraordinarily overbroad. Furthermore, the asserted benefit of increasing the amount of communication is not supported by evidence or logic and, unlike the detriment of government-suppressed speech, is not of constitutional magnitude.

1. ***The interests asserted by petitioners are content based.*** We address the degree of judicial scrutiny properly applied to the ban on redisclosure *infra* in Part II, but it is appropriate to pause here and note that the additional interests asserted by petitioners are entirely content based. According to petitioners, the statute targets "the further injury that occurs when illegally intercepted communications are disclosed," U.S. Br. 9-10, and (more hyperbolically) "the shattering impact of a broadcast in our own words," Bartnicki Br. 35-36 (citation omitted). Unquestionably, these are content-based interests that trigger "the most exacting scrutiny" because the statute "suppresses expression out of concern for its likely

---

hibition would nonetheless far outweigh any limited beneficial effect that it may have in reducing the number of interceptions.

communicative impact." *United States* v. *Eichman*, 496 U.S. 310, 317-18 (1990).

2. ***The ban on redisclosure does not substantially further an interest in privacy because it is overbroad.*** The justifications asserted by petitioners cannot support the ban on redisclosure under even intermediate scrutiny because the statute is not tailored to further them in any respect. Most obviously, the statute's criminal and civil penalties generally apply no matter whether the parties to the intercepted communication exhibited any expectation of privacy. Although the statute defines a protected *oral* communication as one in which the person "exhibit[ed] an expectation that such communication is not subject to interception under circumstances justifying such expectation," 18 U.S.C. § 2510(2), no such limitation applies with respect to wire and electronic communications, see *id.* § 2510(1) (defining "wire communication"), (12) (defining "electronic communication"). Thus, the criminal sanctions and statutory damages triggered by redisclosure are exactly the same no matter whether the cellular call in question was conducted in the proverbial locked vault or instead on a crowded train overheard by dozens of people. They are also the same no matter whether the disclosure is made to one person in a private conversation or to one hundred million people on network television.[13]

---

[13] Of note, it is apparent that the public is aware of the risks that analog cellular calls will be intercepted and therefore do not treat such conversations as particularly private. See J. Scott Orr, *Legal Signals Get Crossed Listening In On Cellular Calls*, STAR TRIB. (Minneapolis, MN), Sept. 14, 1997, at 4D (spokeswoman for Bell Atlantic Mobile indicates that "consumers are not really that concerned about the privacy of their calls, most of which fall into the 'Honey,-I'll-be-a-little-late' category.' 'If you go by what we're hearing from customers, it's not a big problem. * * * People who are concerned about privacy for business reasons or whatever go into the digital phones.'"); *Privacy Hearings Turn Into Propaganda Battle Between PCS and Cellular*, PCS WK., Feb. 12, 1997 ("Tim Ayers, spokesman for the Cellular Telecommunications Industry Association * * * [said that] the vast majority of consumers select mobile communications

Furthermore, as to any category of protected communication – wire, oral, or electronic – the statute does not require that the contents of the communication in fact be private or personal in any respect. The penalties are the same no matter whether the contents of the communication have already been emblazoned on the front page of every newspaper in the country and no matter whether the contents of the call are something as mundane as a grocery list. In this case, for example, petitioners expressly held out the possibility that they would sue all of the local newspapers and television stations that reported on the contents of the intercepted communication after it was repeatedly broadcast by the media respondents; under the statute as written, that was their right. Indeed, it is a criminal violation to redisclose the contents of an intercepted communication even with permission of *both* of the participants. Conversely, the statute is exceedingly underinclusive because it does not prohibit the disclosure of the identical information if learned other than via an unlawful interception, including by an individual who is standing nearby and overhears the identical conversation.

3. *The ban on redisclosure does not substantially further any governmental interest in making communications more secure or in encouraging new technology.* Petitioners fare no better with their assertion that, without regard to

---

for safety reasons and are less concerned about privacy."); *id.* (quoting representative of The Strategis Group Inc. as saying that "[l]ess than 10 percent of [of mobile phone] users even care enough about [privacy] to do anything about it"); *Cellular Privacy, 1997: Hearing Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Commerce Comm.* (1997) (statement of Gary Shapiro, President, Consumer Electronics Manufacturers Association) ("[M]ost cellular telephone users believe their conversations on cellular phones are less secure than corded phones at home. The trade-off between security and cost indicates that most Americans with cellular phones are willing to accept lessened privacy rather than pay a premium for a secure phone. Fewer than one out of four American cellular telephone users would pay a 20 percent premium for a cellular phone which is 100 percent secure.").

whether the contents of any particular intercepted conversation are private, the ban on redisclosure increases confidence in the integrity of cellular communications as a medium, thereby encouraging development of that medium. Here, too, the asserted interest is content based because it rests on the sense of "violation" that arises from the disclosure of one's communication. And, again, the statute is not tailored to further this asserted interest in any respect. It applies to disclosures even to a single person and to all forms of communications without regard to whether they involve "new technologies." Indeed, directly contrary to petitioners' attempted post hoc rationalization of the statutory scheme, the statutory penalties are *lower* when the interception is of a communication made using the "new technologies" to which petitioners advert: analog cellular and cordless telephones. See 18 U.S.C. § 2511(4)(b)(ii) (lower penalties applicable when "the communication is the radio portion of a cellular telephone communication" or "a cordless telephone communication").[14]

Nor can petitioners manufacture an interest of constitutional magnitude by arguing that this case implicates a constitutional "right to be left alone." The First Amendment does not permit the government to suppress speech in even the best-intentioned effort to expand the net amount of communication; it has no role as a speech "equalizer" because the First Amendment is a prohibition on state action, not private conduct. See generally *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978).[15] Similarly, this is not a case involving the

---

[14] Ironically, it is the concern about the privacy of analog cellular calls that has been a primary impetus for the development of new and superior technologies, particularly digital cellular phones. See *supra* at 13-14.

[15] Nor does the redisclosure prohibition result in a net increase in speech. Persons concerned about the security of analog cellular or cordless telephones will use other means of communication, such as digital cellular and conventional telephones. See *supra* at 26 n.14. Furthermore, increased speech *per se* is not necessarily a positive value under the First Amendment. Quantity and quality may trade off and information over-

"right not to speak": the *government* is not attempting to require private parties to convey messages they oppose. Compare, *e.g.*, *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995) (state may not compel parade organizers to include group imparting message organizers do not wish to convey); *Pacific Gas & Elec. Co.* v. *Public Utils. Comm'n*, 475 U.S. 1 (1986) (state may not compel utility to carry message of consumer group on billing statement).[16]

Indeed, the precedents cited by petitioners strongly support the conclusion that the ban on redisclosure is unconstitutional. In *Harper & Row, Publishers* v. *Nation Enterprises*, 471 U.S. 539 (1985), the Court held that a magazine's publication of excerpts from President Ford's memoirs was not protected "fair use" under the Copyright Act because it would seriously undermine the copyright holder's valuable right of first publication. The Court took care to note that the Act encompassed only the "form of expression and not the ideas expressed," and that the First Amendment protected the "unfettered right to use any factual information revealed" in the copyrighted work. *Id.* at 556, 557 (citations omitted). Importantly, immediately after stating that the freedom of expression includes "the right to refrain from speaking at all," *id.* at 559 (citation omitted), the Court emphasized that it was "*not* suggest[ing] this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to sup-

load may set in, as anyone with e-mail quickly learns. Ultimately, the notion that the *government* might manipulate the speech market to what *it* deems an appropriate level is itself an offense against First Amendment values. And such offense is magnified when the government does so by reducing speech directed primarily to the public on issues of public concern in order to increase the secret speech of those in government and elsewhere whose activities are a subject of public concern.

[16] Any attempted expansion by the Solicitor General of such a "right not to speak" would be in serious tension with his position that private parties can be compelled to subsidize nonideological messages. See generally Pet. for Cert., No. 00-276, *United States* v. *United Foods*.

press facts," *id.* (emphasis added). See also *id.* at 560 (emphasizing "the First Amendment protections already embodied in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and ideas").

Not only would the application of Title III in this case extend far beyond the context of copyrighted material, but it manifestly would "suppress facts." The statute categorically prohibits the disclosure of the entire "contents" of an intercepted communication, defined to "include[] *any* information concerning the substance, purport, or meaning of that communication." 18 U.S.C. § 2510(8) (emphasis added). It thus would make no difference under the statute if respondents in this case, rather than disclosing the tape, had simply revealed the fact that petitioner Kane had stated his intention to damage the homes of school board negotiators.[17]

The *dictum* from other cases cited by petitioners stands only for the unsurprising proposition that privacy encourages private communication. *Swidler & Berlin* v. *United States*, 524 U.S. 399 (1998) (attorney-client communications); *Jaffee* v. *Redmond*, 518 U.S. 1 (1996) (psychotherapist-client communications); *United States* v. *Nixon*, 418 U.S. 683 (1974) (executive communications). But it is impossible to take seriously petitioners' suggestion that such an interest, even if given its fullest force, could justify a flat speech prohibition such as Title III's ban on redisclosure. Petitioners apparently believe that the editor of a newspaper can, consistent with the First Amendment, be jailed, fined, and subject to punitive damages for publishing a leaked attorney-client communica-

[17] That the disclosure here included petitioners' particular expression (*i.e.*, the taped conversation) does not reduce First Amendment protections for that disclosure, particularly when petitioners make no claim that the expression was copyrightable, when the disclosures would have been fair use in any event, and when, if anything, the disclosure of the complete expression was actually fairer to petitioners by placing the putative threat in a context that allows the listener to accurately evaluate petitioner Kane's claim to have been engaging in hyperbole.

tion, psychotherapist-client communication, or statement by the President to one of his advisors. Indeed, if the analogy to Title III is fully drawn, such punishment would be constitutional no matter how banal or widely known the subject of the communication. That simply cannot be correct, but it is the natural consequence of accepting petitioners' position.

C. Respondents' Protected Speech Interest Outweighs Any Benefit from The Ban On Redisclosure.

Any incidental benefit from the redisclosure prohibition is far less significant than the statute's substantial speech-prohibiting and speech-inhibiting effects. Title III flatly bans speech on truthful matters of public interest. Moreover, the statute's sweeping, vague provisions chill a still broader array of protected speech for which there is no governmental interest whatsoever in prohibiting. In both respects, the ban on redisclosure infringes not only on the right of the speaker, but also on "the First Amendment interests of speakers and willing listeners," *United States* v. *Playboy Entertainment Group*, 120 S. Ct. 1878, 1887 (2000), to receive important information that already has left the domain of private communications.

1. ***The redisclosure prohibition is a categorical ban on protected speech.*** It is difficult to conceive of a statute that would more broadly ban the dissemination of truthful, factual information of great public interest than the provision in this case. Title III prohibits the "disclosure" (a term that unquestionably encompasses pure speech) of the "contents" of an intercepted communication, which as noted "includes *any* information concerning the substance, purport, or meaning of that communication." 18 U.S.C. §§ 2511(1), 2510(8) (emphasis added). The "contents" are off limits to discussion and debate no matter whether the facts disclosed are already entirely within the public domain and no matter whether they are embarrassing or mundane, indeed no matter whether the parties to the communication approve or even *encourage* the disclosure. Furthermore, the disclosing party may be sued

and criminally charged no matter how far removed from the initial interception, as when a newspaper is the third, fifth, or even tenth party to receive the "contents" and seeks to disclose that information to its readers.

Nor is there any doubt that the contents of a communication that is publicly disclosed by the media frequently will be of paramount public interest. Indeed, the United States frankly acknowledged in its certiorari filings in this case that, "[a]s a practical matter, it is information of public significance that is most likely to be passed from a wiretapper to third parties and, as in this case, to be publicly disclosed." Reply Br. of U.S., No. 99-1728, at 3. The communication at issue in this case involved direct threats of violence in connection with public-sector labor negotiations. The communication at issue in *Boehner* involved the appearance of congressional impropriety. Press reports indicate that the disclosure of interceptions has also prevented crimes, notwithstanding that even disclosure to the *police* is illegal under Title III.[18]

Finally, the ban on speech extends indefinitely into the future and in every possible context. The statute thus creates the virtual antithesis of a reasonable "time, place, or manner" restriction tailored to an important particular interest. One may not speak regarding the contents of an intercepted communication at any time, in any place, or in any manner.

2. ***The redisclosure prohibition chills significant amounts of protected speech.*** Petitioners largely limit their briefs to proffering interests, discussed *supra* at 11-30, that

---

[18] See M.E. Kabay, *The Year-In-Review*, INFO. SECURITY, Dec. 1998, at 16 (recounting a 1998 incident in which a New York woman alerted police that she had overheard a wireless telephone conversation in which two men planned an attack on an elderly woman, thereby enabling police to arrest suspects before they could commit crime); Michael Krantz, *Guess Who's Listening*, TIME, Jan. 27, 1997, at 30 (scanner user "overheard some fleeing criminals and alerted the cops to their whereabouts").

supposedly justify the ban on the redisclosure of the contents of intercepted communications. But they largely ignore the still more troubling chilling effect that the statute has on protected speech. For every suppressed piece of information derived from an unlawful interception, Title III will chill the publication and discussion of dozens of other pieces of lawfully revealed truthful information on matters of public importance that, because of doubts about their provenance, will be perceived possibly to fall within the statutory prohibition.

The redisclosure prohibition chills protected speech because, given the statute's application to almost every form of communication and its broad definition of "contents," it potentially applies to any piece of information. For example, any statement reflecting the contents of a private conversation could have been secured from an interception of that oral communication. Equally, any fact about a business could have been secured by intercepting a cellular call or electronic mail message. The possible examples are endless. Nor is the statute even limited to private facts, given that it applies equally to information that is already public.[19]

This point is particularly apparent when Title III is compared with the statutes at issue in the *Daily Mail* line of decisions. Those cases involved prohibitions on the publication of readily identifiable pieces of information – such as the contents of certain public proceedings (*Landmark Communications*), the names of juvenile offenders (*Daily Mail*), and the names of rape victims (*Florida Star*) – that could be identified with relative ease by the media. This Court nonetheless invalidated those statutes in substantial part because of "the 'timidity and self-censorship' which may result from allowing the media to be punished for publishing certain truthful in-

[19] Indeed, a person receiving an unlawful interception will be chilled from publishing or discussing even independently obtained information on the same subject matter for fear of the difficulty of later proving the independent source.

formation." *Florida Star*, 491 U.S. at 535 (quoting *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 496 (1975)). An "illegally intercepted communication" subject to Title III can relate to any issue and (unlike stolen mail) will have no identifying physical characteristics. Literally, any fact can be the subject of an illegal interception; discussion of that fact could, in turn, lead to serious criminal and civil liability.

Petitioners argue that the redisclosure prohibition does not chill speech because it applies only when the speaker has "reason to know" that the information in question is the contents of an illegally intercepted communication, a standard that (at least according to the RESTATEMENT (SECOND) OF TORTS) does not create a duty of inquiry. But petitioners' entire line of argument on this point is in tension with their principal contention that the breadth and substantial penalties of the redisclosure provision are necessary to eliminate the "market" for intercepted communications. Title III's chilling effect is simply the other side of the coin of its considerable overdeterrence.[20]

Petitioners' argument also fundamentally misconceives the risks that will cause protected speech to be "chilled." Even if a speaker has substantial confidence that a jury would eventually find that she had no "reason to know" of any illegal interception, it will take an exceptionally confident speaker indeed to risk a *felony conviction*, criminal fines, hard jail time, a civil suit, statutory damages, compensatory damages, and punitive damages. Accord *Reno* v. *ACLU*, 521 U.S. 844, 871-72 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvi-

[20] Similarly, petitioners cannot seriously maintain that the stringent criminal and civil sanctions of the redisclosure provision will *not* chill speech while simultaneously insisting with hyperbolic vigor that private conversations will be chilled by the minimal possibility of interception and public disclosure. *E.g.*, U.S. Br. 43 ("[I]t is far more chilling of speech for a person to know that his private expressions may later be reported with impunity to the world at large.").

ous chilling effect on free speech. * * * [In addition, the] severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." (citations omitted)). This concern is substantially heightened by the risk that the subjects of unfavorable news reports or local gossip may bring suits under Title III that ultimately prove meritless, particularly given that the statute does not require the plaintiff to have suffered any injury at all in order to bring suit. The mere potential for a suit, regardless of outcome, creates a threat that will chill much speech that would ultimately have been proven lawful. Petitioners also misconceive the sophistication of the persons potentially subject to liability, as they assume that reporters, editors, and even private citizens will, in deciding whether they should risk going to jail for publishing a particular story or even engaging in a simple conversation, turn a studied eye to their respective copies of the RESTATEMENT (SECOND)'s definition of "reason to know."[21]

Finally, it cannot be overemphasized that the speech chilled by the redisclosure ban not only is truthful and addressed to matters of public importance, but also is categorically protected by the First Amendment in the sense that the government has no direct interest in suppressing it. Indeed,

---

[21] A further chilling effect arises from the application to the media of the categorical prohibition on "use" of intercepted communications. Even if the media does not intend to disclose the contents of a particular communication, it may not "use" the information to develop independent sources or to confirm facts. Just as troubling from the perspective of "chilling" speech, reporters must be constantly vigilant to the possibility that a source has provided them with unlawfully intercepted information that cannot then be utilized for any purpose. Any effects of a subsequent story based on that information could give rise to substantial compensatory and punitive damages. Indeed, the only practical effect of the statute's "reason to know" standard would seem to be that, ironically, it discourages the media from exploring the authenticity and provenance of information, for fear that it will be revealed that the information arises from an unlawful interception.

any fair and thorough discussion of the "governmental interests" implicated by this case would recognize that the government in our democratic society has every interest in *encouraging* such speech.

3. ***The chilling effects of the redisclosure ban cannot be avoided by having this Court amend the statute.*** In what can only fairly be described as an implicit concession that the redisclosure provision is unconstitutional as written, petitioners offer a litany of proposed changes to Title III that would in various respects limit its substantive scope and set a higher bar for imposing liability. The most fundamental flaw in this line of argument is that it violates the separation of powers: this Court interprets federal statutes; it does not enact or amend them. (Relatedly, in contrast to much of the Solicitor General's brief, the role of the executive branch is to enforce the law, not to provide this Court with proposed statutes and hypothesized supporting records for those proposals.) When a law violates the First Amendment, "it is for Congress, not this Court, to rewrite the statute." *Blount* v. *Rizzi*, 400 U.S. 410, 419 (1971). The respective roles of the separate branches of government are all the more important in this context, in which judgments must be made based on empirical determinations regarding the existence of supposed "markets" and the degree of deterrence provided by criminal and civil penalties that lie far afield from this Court's expertise. Such concerns are substantially heightened in this case, in which petitioners throw out proposals left and right, none with anything more than a *single sentence* of discussion.

Furthermore, there now exists the very gravest doubt that Congress would enact Title III's redisclosure prohibition at all, much less a provision reflecting petitioners' various amendments. The redisclosure prohibition was enacted in 1968, a *decade* before this Court articulated what has come to be known as "the *Daily Mail* principle": that when "a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitution-

ally punish publication of the information, absent a need to further a state interest of the highest order." *Smith* v. *Daily Mail Publ'g Co.*, 443 U.S. 97, 103 (1979)[22] More recently, Congress has not adopted such redisclosure prohibitions even as to exceedingly sensitive information. See *supra* at 14-15 (discussing, *inter alia*, recently passed bill regarding leaks of classified information).[23]

It therefore is noteworthy that there are a host of proposals to better enforce Title III's underlying prohibition on interception that, because they do not raise the same degree of First Amendment concern, Congress would be far more likely to adopt than those floated by petitioners. As the Third Circuit explained, Pet. App. 35a, the federal government and the states could more actively enforce their existing criminal prohibitions on interceptions. Or they could potentially enact prohibitions on the receipt and possession of unlawfully intercepted communications, which are conspicuously missing from current wiretapping laws. The government could also fund the development of communications technologies that could not be easily intercepted. Indeed, if the problem of interceptions were serious enough, the government could *require* the use of such technologies.

Petitioners do not even attempt to argue that any of their alternative proposals would do anything other than change the statute as written. This is accordingly not a case in which "a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Thus, petitioners cannot seriously suggest that the statute could, consistent with its existing terms, be limited to prohibit only the disclosure of verbatim tapes of intercepted communications rather than the entire "contents" of those communications. Nor could it be modified so as not to apply to matters of "common knowledge," a proposal based upon a single sentence in a single congressional report but at war with the plain text of the statute and with Congress' obviously broad intent.[24]

Petitioners' remaining proposals – adoption of higher burdens of proof or more stringent standards of appellate review – are drawn from this Court's analysis of common law causes of action and its articulation of standards that would be sufficient under the First Amendment if subsequently adopted by a legislature. None involve a circumstance in which this Court has taken it upon itself to engraft a standard that conflicts with a statute's text. See *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964) (articulating "actual malice" standard applicable to defamation claims brought by public figures); *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) (requiring proof of "clear and convincing evidence" in public figure defamation action); *Bose Corp.* v. *Consumers Union*, 466 U.S. 485 (1984) (requiring "*de novo*" review of actual malice determination). Just as important, none of these proposals would reduce the profound chilling effect of the redis-

---

[22] There is every indication that even when Congress amended Title III in 1986, it was not cognizant of the scope of the statute's ban on *re*disclosure.

[23] As discussed previously, the failure of this bill to include a redisclosure provision for leaks of sensitive, classified information also calls into the most serious question petitioners' assertions that a redisclosure provision is essential to effectuate Title III's underlying ban on interceptions.

[24] Furthermore, this proposal would require an impermissible inquiry into the content of the disclosure, see *infra* at 47-50, and (as a few examples illustrate) would create far more questions than it would answer and therefore would not substantially reduce the chilling effect caused by the ban on redisclosure. For example, would "common knowledge" be measured locally, nationally, worldwide, or by some other measure, such that if a fact was known in a particular town, it could be published there but not in a national newspaper? What if a convention were in town at the time of publication? And, would liability attach if the underlying fact were publicly alleged but disputed, such that the contents of the interception would confirm the allegation? What if a newspaper knew that the same information was about to be disclosed by a competitor; would it have to allow itself to be "scooped"?

closure ban (much less address the statute's direct prohibition on protected speech). That a civil plaintiff must prove by "clear and convincing evidence" that the defendant "should have known" that particular information came from an intercepted communication, or that "*de novo*" appellate review will later apply to that determination, makes no real difference: the risks that disclosure will give rise to civil and criminal liability are still great and clouded in uncertainty.

Title III's prohibition on redisclosure is accordingly unconstitutional under even intermediate scrutiny.

II. PROHIBITIONS ON REDISCLOSURE OF TRUTHFUL INFORMATION MUST RECEIVE STRICT SCRUTINY.

While petitioners try – though fail – to show that the redisclosure provision satisfies intermediate scrutiny, they do not seriously suggest that application of the statute in this case could survive strict scrutiny. Instead they claim strict scrutiny does not apply. They are incorrect. There are multiple grounds for applying strict scrutiny here, and no colorable argument that the redisclosure ban either serves "compelling" interests or constitutes the least restrictive means of doing so.

A. The *Daily Mail* Principle Requires Strict Scrutiny in This Case.

In *Daily Mail*, this Court set out the principle that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." 443 U.S. at 103. This Court reaffirmed *Daily Mail*'s application of strict scrutiny in *Florida Star*, holding that "where a newspaper publishes truthful information which *it* has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order." 491 U.S. at 541 (emphasis added). The present case is materially indistinguishable from *Florida Star* for purposes of the standard of review, and consequently strict scrutiny applies.

There is no dispute that the information redisclosed by respondent Yocum was "truthful." Indeed, given petitioner Kane's claim to have made his threats rhetorically, Bartnicki Br. 5, redisclosure of the recording – context, inflection, and all – was a more accurate form of speech than any mere transcript, interpretive report, or other means of conveying information. Cf. Bartnicki Br. 17 (claiming to defend the statute only as applied to redisclosure of entire tape and declining to defend laws as they nonetheless apply to less accurate disclosures of "particular facts [respondents] learned from the tape without making public the actual verbatim recording"). And the union had its full say in the press, using the preferred First Amendment approach of more speech to place Kane's statements in such further context as it thought appropriate. See *supra* at 3. There is likewise no doubt that respondent Yocum receives the same protection under the *Daily Mail* principle as the media respondents.

The only dispute over application of the *Daily Mail* principle, therefore, is whether respondent Yocum "lawfully obtained" the information he redisclosed. Despite petitioners' attempts to conflate Yocum's *receipt* of the information with a third party's separate and prior alleged illegality in *intercepting* the communication, all petitioners ultimately concede that respondent Yocum had no involvement of any sort in the alleged intercept. Bartnicki Br. i (Question Presented); U.S. Br. i (Question Presented), 7. Respondent Yocum himself thus violated no laws in receiving and possessing the tape recording delivered anonymously to his house.

While any actual interceptor may have "unlawfully obtained" the information at issue – thereby taking *the interceptor's* initial disclosure outside of the *Daily Mail* principle – Yocum's lawful *receipt* of that information and subsequent *redisclosure* are indistinguishable from the facts of *Florida Star*. Indeed, in *Florida Star*, the initial disclosure by the police was itself wrongful, and in violation of the department's obligation "not to 'cause or allow to be * * * published' the

name of a sexual offense victim." 491 U.S. at 536. But despite this initial wrong on the part of the source, this Court held that the prior wrongful act did not "make the newspaper's ensuing *receipt* of this information unlawful. Even assuming the Constitution permitted a State to proscribe *receipt* of information, Florida has not taken this step." *Id.* (emphasis added). So, too, here: respondent Yocum's *receipt* of the tape was not unlawful. Neither the United States nor Pennsylvania has proscribed receipt or possession of intercepted information. Because Yocum was entirely innocent of any underlying wrongdoing and had lawfully obtained the information in this case, any laws penalizing his subsequent and truthful speech must receive strict scrutiny under *Daily Mail*.[25]

The Solicitor General attempts to distinguish *Florida Star* by citing the Court's dictum that "[t]o the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition, thereby bringing outside of the *Daily Mail* principle the publication of any information so acquired." 491 U.S. at 534; U.S. Br. 29. The Solicitor General likewise cites to *Florida Star*'s recognition of an open question "whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." 491 U.S. at 535 n.8; U.S. Br. 29. Neither statement, however, applies to the situation in this case or refutes the applicability of the *Daily Mail* principle to redisclosure by a person who is individually innocent of any underlying illegality.

---

[25] Mere knowledge of upstream illegality by a third party in connection with the information does not distinguish this case from *Florida Star*, in which the media defendants plainly had reason to know that the release by the police department of the information at issue was unlawful – it violated the very same law underlying the action against the newspaper. 491 U.S. at 536.

First, both of the hypotheticals posed by the preceding quotes refer to initial publication or disclosure by a person possessing the information through his *own* illegal acquisition of that information. But respondents are not challenging the provisions as applied to ban unlawful interception or initial disclosure by the interceptor himself. Rather, they are challenging the *re*disclosure provision as applied to wholly innocent recipients. Nothing in *Florida Star* suggests that a wholly innocent recipient would lose the protection of the *Daily Mail* principle based upon a prior wrong by another.

Second, the initial hypothetical suggests a possible exception only for "sensitive information," whereas the redisclosure ban in this case sweeps far more broadly than that. Certainly, the information here – a putative bomb threat in connection with public-sector labor negotiations – can hardly be the "sensitive" information that the Court had in mind.

Third, the latter statement's disjunctive reference to unlawful acquisition "by a newspaper or a source" is at best ambiguous about what the Court thought was unresolved, and in context seems to leave open only the disjunctive though parallel situations of publication by a guilty source to the newspaper or by a guilty newspaper to the public. That is a more natural reading of the second portion of the quote and its unitary references to punishing "the unlawful acquisition" and "the ensuing publication." It is simply too much of a stretch to claim that those latter references can be read to encompass re-publication by an *innocent* recipient.

Fourth, the cases cited in the remainder of footnote 8 of *Florida Star* more accurately illustrate the issue not "resolved" and the question that has been "reserved," U.S. Br. 29, outside the bounds of the *Daily Mail* principle. Thus, in both *Landmark Communications* and the Pentagon Papers case, the issue that remained up for grabs involved only publication by a directly *culpable* party, not re-publication by an *innocent* downstream recipient of a prior unlawful acquisition. See *Landmark Communications*, 435 U.S. at 837 ("We

are not here concerned with the possible applicability of the statute to one who secures the information by illegal means and thereafter divulges it."); *New York Times Co.* v. *United States*, 403 U.S. 713, 737 (1971) (White, J., concurring) (noting that it is a criminal act for an unauthorized recipient of a national defense document "to retain the document"); *id.* at 743 (Marshall, J., concurring) (noting that it is a crime to "receive" certain documents of the type at issue); *id.* at 751 n.2 (Burger, C.J., dissenting) (implying complicity between the paper and the thieves by noting that "the Times explained its refusal to allow the Government to examine its own purloined documents by saying in substance this might compromise its sources and informants"). The question expressly reserved in *Landmark Communications* is not remotely apposite here. And the unresolved issue of post hoc liability in the Pentagon Papers case involved speakers who, unlike here, had seemingly violated the laws by mere receipt and possession of the documents in question and may well have been accomplices either before or after the fact of the underlying theft.

In short, the questions left open by prior cases up through *Florida Star* are still not presented by the current case, which deals only with a situation already covered in all material respects by the *Daily Mail* principle – an innocent recipient redisclosing information initially published to him and others by an unrelated upstream wrongdoer. Strict scrutiny applies.

B. Strict Scrutiny Should Apply Because The Redisclosure Ban Directly Restricts Speech.

Regardless of whether the *Daily Mail* principle itself applies, the laws here must receive strict scrutiny because they impose a direct and significant restriction on speech itself, rather than a merely incidental burden on speech from a restriction on conduct. Section 2511(1)(c) directly prohibits "disclosure" of information contained in certain intercepted communications, and consequently acts uniquely and exclusively on "speech." The Pennsylvania law goes even further, prohibiting disclosure not only of the contents of an intercepted communication, but also of information "derived" therefrom. 18 Pa. Cons. Stat. § 5703(2).

When, as here, regulations act directly upon speech and thus have as a necessary purpose the "suppression of free expression," intermediate scrutiny is inapplicable and strict scrutiny is required. *O'Brien*, 391 U.S. at 377; see also *City of Erie* v. *Pap's A. M.*, 120 S. Ct. 1382, 1391 (2000) (plurality opinion) (strict scrutiny turns on whether the government regulation is related to the suppression of expression); *Nixon* v. *Shrink Missouri Gov't PAC*, 120 S. Ct. at 903 (noting *Buckley*'s rejection of *O'Brien* standard and application of strict scrutiny at least as to direct limits on expenditures); *Butterworth* v. *Smith*, 494 U.S. 624, 632 (1990) (strict scrutiny applied to direct ban on redisclosure of speech based upon prior venue – before a grand jury – of that speech); *Schneider* v. *State*, 308 U.S. 147, 160-64 (1939) (effectively applying strict scrutiny to content-neutral ban on leafleting). And because the broad prophylactic restrictions cover sweeping categories of information not themselves necessarily sensitive, confidential, or otherwise of concern, they are especially suspect. See *NAACP* v. *Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect. * * * Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.") (citation omitted).[26]

---

[26] Petitioners assert that this case does not involve any prior restraint on the publication or disclosure of information. Bartnicki Br. 19. But as a practical matter, the absolute prohibition on redisclosure regardless of any individual harm from the speech accomplishes the same practical result as punishment for violation of a prior restraint and thus increases the likelihood that the speaker will remain silent to the same extent as does a prior restraint such as a requirement to submit a specified category of speech to government censors. Furthermore, the availability of an injunction under 18 U.S.C. § 2512 demonstrates that the disclosure ban has the ability actually to be a prior restraint, not just to emulate one.

Petitioners incorrectly suggest that the restrictions herein are merely "incidental" and hence should be evaluated under the conduct test set out in *O'Brien* and its progeny. Bartnicki Br. 20; U.S. Br. 18-20. In *O'Brien*, the law forbade harmful conduct – the destruction of an official document – that was not inherently expressive. The impact on speech from that regulation of conduct was indeed "incidental," and hence eligible for intermediate scrutiny so long as various other conditions were met. 391 U.S. at 377. But the burden on speech in this case stems from a direct restriction on "disclosure," an inherently and exclusively communicative act.[27]

Nor are the speech restrictions in this case merely incidental consequences of otherwise generally applicable laws. The general state contract law at issue in *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991), for example, regulated the *conduct* of entering into enforceable agreements, regardless of the objects of such agreements. That the parties themselves made speech the object of their agreement may have had the effect of burdening speech, but the state law in question was still targeted at the conduct of contract formation, not at the speech that the parties had entangled with such conduct. The burden on speech in that case was truly "incidental" to the law's regulation of conduct, and was a function of the voluntary assumption of a contractual duty of confidentiality. This Court in *Cohen* itself distinguished the state-defined restrictions in *Florida Star* and *Daily Mail* by noting that the Minnesota law on promissory estoppel "simply requires those making promises to keep them. The parties themselves, as in

[27] Only the ban on interception itself fits the *O'Brien* framework of a conduct regulation that has an incidental impact on speech. The secondary redisclosure ban, however, is instead comparable in *O'Brien* terms to a ban on reporting, televising, or disclosing illegal conduct. Regardless whether the content of such reporting would be derived from an unlawful act, and might be argued to encourage such acts by providing them with a "market," no one could seriously suggest that such direct speech restrictions would be subject to less than strict scrutiny.

this case, determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are self-imposed." 501 U.S. at 671.[28]

In this case there is no such voluntary assumption of silence on the part of respondent Yocum, and he is being penalized entirely pursuant to a state-defined restriction on the "disclosure" of certain information. This case does not involve generalized restrictions on conduct that may have the incidental effect of limiting speech. Rather, the challenged laws operate directly to forbid activity – disclosure – that intrinsically and exclusively constitutes speech. It is thus unlike generic contract law or other general laws that prohibit harmful conduct such as destroying government documents regardless of whether such destructive acts may also have a communicative purpose.

Petitioners are also wrong in suggesting that the redisclosure ban does not directly suppress speech because other provisions of the law *also* suppress nonspeech "use" of intercepted information. Bartnicki Br. 20-21; U.S. Br. 23. The statutes themselves plainly identify a difference between use and disclosure, as reflected in their separate treatment of the two different behaviors. The Solicitor General's assertion, without a shred of support, that the prohibition on disclosure is encompassed by the "undifferentiated prohibition on use," and that "the only difference is one of clarity," U.S. Br. 24-25, renders the disclosure provision meaningless and mocks a fundamental canon of statutory construction routinely relied upon by this Court and often cited by the United States. See, *e.g.*, *United States* v. *Alaska*, 521 U.S. 1, 59 (1997) ("The

[28] *Cohen* also noted that the newspaper may not have "lawfully" obtained the information it then published insofar as it "obtained Cohen's name only by making a promise that [it] did not honor." 501 U.S. at 671. The case thus fell outside the *Daily Mail* principle because the speaker was also the primary wrongdoer.

Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'") (citation omitted).[29]

Finally, the Solicitor General's suggestion, U.S. Br. 19, that the *O'Brien* standard has been extended to pure speech restrictions so long as they are content neutral is incorrect. The cases he cites for that proposition involved either time-place-manner restrictions or did not forbid speech at all. See *Procunier* v. *Martinez*, 416 U.S. 396, 409 (1974) (considering, in the prison context, restrictions on a "particular means of communication," but then striking those restrictions because they were content based); *Turner Broadcasting Sys.* v. *FCC*, 512 U.S. 622, 647, 661 (1994) (challenged regulations "do not produce any net decrease in the amount of available speech" and "leave cable operators free to carry whatever programming they wish on all channels not subject to must-carry requirements"; regulations "are justified by special characteristics of the cable medium: the bottleneck monopoly power exercised by cable operators").[30] Title III's redisclosure ban is not remotely like a time-place-manner restriction in that there is no alternative avenue for conveying the forbidden communications. Here, the content of the communication at issue is suppressed regardless of the time, place, or manner of the disclosure.

Contrary to the Solicitor General's assertion, therefore, the goals of the challenged provisions in this case are not "unrelated to the suppression of speech." U.S. Br. 19. Rather, the redisclosure bans are directly "[r]elated to the suppression of speech" given that all they do is suppress speech. That is

---

[29] There is no claim in this case that respondent Yocum did *anything* with the tape other than engage in the pure speech of disclosure. The "use" restrictions on intercepted information are thus not at issue in this case.

[30] *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522 (1987), was a trademark case that the Court viewed as involving only a prohibition on the "manner" of expressing certain messages that might mislead or dilute the value of the mark.

their entire function and their sole goal – to suppress speech containing a particular class of information. Whatever the government's motives for wanting such speech suppressed, that does not change the character of, and hence the level of scrutiny to be applied to, a direct suppression of speech.

C. The Redisclosure Ban Is Content Based and Purportedly Justified by The Communicative Impact of Speech.

A speech restriction is content based – and hence subject to strict scrutiny – if the operation of, or justification for, that restriction turns on the content or the communicative impact of the speech to be restricted. As the United States itself concedes, "'even a regulation neutral on its face may be content based,' and hence subject to strict scrutiny, 'if its manifest purpose is to regulate speech because of the message it conveys.'" U.S. Br. 21 n.7 (quoting *Turner*, 512 U.S. at 645). In this case, penalties under the statutes are necessarily determined by reference to the content of the speech and are justified based on the communicative impact of the speech.

First, the redisclosure ban expressly penalizes disclosure of the "content" of an intercepted communication, and hence is, on its face, content based. The ban makes direct reference to specific information and expression and forbids speech containing such content. That the details of such "content" are variable, and must be determined by reference to contingent facts, *i.e.*, what was said in the intercepted communication, does not make the redisclosure ban any less content based. Numerous cases in which this court applied strict scrutiny are similarly contingent in their reference to the content of regulated speech. See, *e.g.*, *Miami Herald Publ'g Co.* v. *Tornillo*, 418 U.S. 241 (1974) (content of compelled speech contingent upon variable content of prior publication by paper); *Butterworth*, 494 U.S. at 627 (content of prohibited speech contingent upon entirely variable content of witness's testimony before grand jury).

Second, in making the determinations whether and to what extent liability exists, a decision maker must necessarily refer to the content of the prohibited speech. Likewise, a decision to sue, to prosecute, or for a jury to find liability would necessarily depend on the content of the allegedly intercepted speech and the content of the challenged "disclosure." Furthermore, in their attempt to save the statute from gross overbreadth, petitioners suggest that the law must be construed in a content-based manner, arguing that liability would eventually turn on the public or private nature of the intercepted communications. See Bartnicki Br. 17-18; U.S. Br. 44. While the statute does not say as much, the suggestion of such enforcement by the statute's own partisans amply illustrates how the decision to sue and to prosecute is uniquely vulnerable to decisions based on the perceived value of the speech, the perceived value of the intercepted communication, and on a variety of other content-driven concerns.

Third, the challenged speech restrictions are justified in substantial part by reference to the communicative impact of the disclosures, and hence must be treated as content based, regardless of whether they might be considered facially neutral. As the private petitioners recognize, and as the United States studiously ignores, one of Congress' primary concerns when it passed the anti-disclosure provision was with the "'privacy of communication.'" Bartnicki Br. 6 (quoting S. REP. NO. 90-1097, 90th Cong., 2d Sess. 67 (1968)). Congress was concerned with protecting specific categories of information, including "[e]very spoken word relating to each man's personal, marital, religious, political, or commercial concerns." *Id.* In short, Congress was concerned with protecting privacy and private information.

Petitioners' claim that the redisclosure ban displays no hostility toward and applies regardless of the message being conveyed, U.S. Br. 19, is not accurate. The law is plainly hostile toward the message insofar as the message conveyed is the disclosure of supposedly private information. The law

may not evidence any facial hostility toward any particular *viewpoint*, but it unquestionably is hostile to messages that contain private content. While viewpoint discrimination is sufficient to trigger strict scrutiny, it is not necessary to demonstrate such further discrimination when a law discriminates based on the content of a communication.[31]

Fourth, in addition to the content-based nature of the law and its justifications, the restrictions in this case are in fact being applied in a content-based manner. The current case is being selectively pursued against respondent Yocum, who was opposed to the salary demands of the union represented by the private petitioners. Petitioners also are pursuing the media respondents based upon antipathy towards the overall broadcast content from the media respondents, despite petitioners' admission that other members of the media had received copies and had disclosed the contents of the conversations. The only reason that the particular media respondents in this case were singled out appears to be a long-standing content-based disagreement with their reporting practices. Thus, petitioners Bartnicki and Kane engage in *ad hominem* attacks on the "journalistic practices" of the media respondents here and note that the local District Attorney's office discriminates against those respondents based upon their supposedly "irresponsible" journalism. Bartnicki Br. 6 n.2. That other members of the media allegedly did not disclose the in-

---

[31] The Third Circuit recognized that the separate justification for the redisclosure ban based on the harm to privacy from each specific redisclosure turned on the communicative impact of the forbidden speech and therefore was not content-neutral. Pet. App. 26a-27a. But in merely deciding to ignore this justification in its analysis, the court erred. In *O'Brien*, intermediate scrutiny was applied where the law punished O'Brien for the "noncommunicative impact of his conduct, *and for nothing else.*" 391 U.S. at 382; see also *id.* at 381-82 ("both the governmental interest and the operation of the 1965 Amendment are limited to the noncommunicative aspect of O'Brien's conduct"). Here, even if *one* of the justifications for the law might be content neutral, such justifications are not the *exclusive* bases for the law and hence the *O'Brien* test is inapplicable.

formation until after respondent Vopper's broadcast is no basis for distinction given that neither the federal nor state statute draws such a first-publication line, petitioners repeatedly claim that each subsequent dissemination is independently harmful, and there is no claim in this case of actual harm or request for compensatory damages based on the first media disclosure. Bartnicki Br. 9. The redisclosure prohibition thus poses precisely the types of "inherent dangers to free expression" and the "potential for censorship or manipulation" that justify strict scrutiny. *Turner*, 512 U.S. at 661.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

ERIK S. JAFFE
ERIK S. JAFFE, P.C.
5101 34th St., NW
Washington, DC 20008
(202) 237-8165

FRANK J. ARITZ
23 West Walnut St.
Kingston, PA 18704

THOMAS C. GOLDSTEIN
Counsel of Record
AMY HOWE
THOMAS C. GOLDSTEIN, P.C.
4607 Asbury Pl., N.W.
Washington, DC 20016
(202) 237-7543

Counsel for Respondent Jack Yocum

Dated: October 25, 2000